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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973.

No. 73-84

DARRELL WALKER,
Petitioner,

VS.

PETER J. BRENNAN,
Secretary of Labor,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

This is a Petition to review the holding of the United States Court of Appeals for the Fifth Circuit that Petitioner Darrell Walker, who is engaged in a private employment agency business, is not entitled to exemption as a retail or service establishment under the Fair Labor Standard's Act.

OPINIONS BELOW

The original opinion in this case was rendered by the United States District Court for the Middle District of Alabama in James D. Hodgson, Secretary of Labor, vs. Great American Discount and Credit Company, Inc. and Darrell Walker, 336 F. Supp. 1355. The Court of Appeals for the Fifth Circuit reversed the District Court in Peter J. Brennan, Secretary of Labor, vs. Great American Discount and Credit Company, Inc., _____ F.2d _____. Because the case was dismissed against Great American in the District Court, Darrell Walker (the individual defendant in the District Court) is the only Petitioner here.

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit, to which Petitioner requests Writ of Certiorari, was rendered on the 9th day of April, 1973. The jurisdiction of this Court is invoked pursuant to Supreme Court Rule 19(1)(b) which reads, in part:

> "where a court of appeals has . . . decided an important question of federal law which has not been, but should be, settled by this court . . .".

QUESTION PRESENTED

Did the United States Court of Appeals for the Fifth Circuit err in holding that employment agencies are not entitled to the retail or service establishment exemption in Section 13(a)(2) of the Fair Labor Standards Act. 29 U.S.C.A. Section 213(a)(2)?

STATUTES INVOLVED

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, 29 U.S.C. 201 et seq.:

Section 13(a)(2) - (text set forth in Appendix)

Section 17 - (text set forth in Appendix)

Age Discrimination in Employment Act of 1967, 81 Stat. 602, 29 U.S.C. 621 et seq.:

Section 4(b) - (text set forth in Appendix)

Section 4(e) - (text set forth in Appendix)

Section 7(b) - (text set forth in Appendix)

Miscellaneous:

Wage and Hour Administrator's Interpretative Bulletin No. 6, pp. 9 - 10.
29 CFR 779.317 - (text set forth in Appendix)

STATEMENT

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act and Section 7(b) of the Age Discrimination in Employment Act of 1967 to enjoin defendant Darrell Walker from violating the minimum wage and recordkeeping requirements of the Fair Labor Standards Act and the provisions of Sections 4(b) and 4(e) of the Age Discrimination in Employment Act.

The Defendant admitted that these employees were not paid in accordance with the statutory minimum wage requirements and that records had not been maintained of their hours of work. The Defendant denied, however, that the em-

ployees were within the coverage of the Fair Labor Standards Act and claimed as an affirmative defense that they were, in any event, within the complete exemption provided by Section 13(a)(2) of that Act for any employee employed by a "retail or service establishment". The Defendant also denied any discriminatory practices in violation of the Age Discrimination in Employment Act.

After hearing the evidence and considering the pleadings and pretrial stipulation, the Court issued a memorandum opinion and judgment holding that defendant's employees were within the Act's coverage, but that the various employment agencies operated by defendant were exempt from the requirements of the Fair Labor Standards Act under Section 13(a)(2). The court also ruled that defendant had violated Section 4(e) of the Age Discrimination in Employment Act. However, the court held that defendant had not committed discriminatory practices proscribed by Section 4(b) of that Act. Accordingly, the Court issued an injunction limited to future violations of the provisions of Section 4(e) of the Age Discrimination in Employment Act.

During the period from 1969 to the filing of this suit, Darrell Walker was or had been the sole owner of eleven separate and independent employment agencies. Prior to the filing of this suit, two of these agencies were closed. During this same period, Mr. Walker was a partner in seven other employment agencies. Only one solely owned agency and one partnership was located outside the State of Alabama. The gross annual dollar volume of sales by all the employment agencies in which Darrell Walker has an interest exceeds $250,000.00, but no individual employment agency has ever exceeded $250,000.00 annual gross volume of sales

or business done. The annual gross volume of sales or business done for all the employment agencies solely owned by Mr. Walker does not exceed $250,000.00.

The individual employment agencies in which Darrell Walker has an interest are typical of many such small local agencies throughout the country. Each local agency seeks to find suitable employment for its clients who, in turn, agree to pay the agency once the client has begun to work for an employer obtained by the agency and only infrequently is the fee paid by an employer. This service is performed strictly on a local basis and without contact with other agencies, except for the wholesale aspect of the business as described below. Once the service of putting the job applicant and the prospective employer together is performed, there is nothing left to the transaction for resale.

Testimony given by Mr. Walker and by the plaintiff's witnesses shows that there exists in the employment agency business, a "wholesale" aspect wherein certain agencies trade or sell information to each other. In fact, there was no dispute, during the trial, that Mr. Walker's employment agency establishments could be distinquished from larger national agencies such as Snelling and Snelling, that have inter-office referals across the country. Each agency in question is an independent establishment, and has no contact with other agencies involved here.

The only advertising, interviewing, and arranging for transportation done for jobs out of state is done solely by Mrs. Warrick from Montgomery Employment Agency, where she is paid at least the minimum wage required by law. Mr. Walker's former bookkeeper and the bookkeeper's

secretary were paid at least the minimum wage. These were the only individuals that plaintiff has attempted to show were engaged in commerce.

The one employment establishment that deals at all with job applicants from across state lines or deals with job orders across state lines is Memphis Employment, Memphis, Tennessee. Mr. Walker testified that the percentage of out of state applicants in the Memphis agency would be four or five per cent, and that there has never been an out of state job filled by the Memphis, Tennessee agency.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Fifth Circuit ruled that the Defendant's employment agency businesses did not fit the retail concept so as to be exempt from coverage under the Fair Labor Standards Act provisions for minimum wage and recordkeeping requirements. Section 13(a)(2) of the Act exempts from the minimum wage requirements of the Act,

> "any employee employed by any retail or service establishment . . . if more than 50 per centum of such establishment's annual dollar volume of sales of goods or services is made within the state in which the establishment is located, and such establishment . . . has an annual dollar volume of sales which is less than $250,000 . . .".

A retail or service establishment is

> "an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both)

> is not for resale and is recognized as retail sales or services in the particular industry . . .".

None of the individual establishments involved in this case ever exceeded $250,000 annual gross volume of sales and virtually all of each establishment's annual dollar volume of sales of goods or services is made within the state in which the establishment is located. Therefore, the requirement that needed to be proved to the Court was that the individual agencies were retail or service establishments within the meaning of the Act.

The Court of Appeals not only found that the Defendant, Darrell Walker's employment agencies did not fit the retail concept, but also found that the retail concept can never apply to the employment agency industry.

The facts elicited from the testimony of witnesses, most of whom were government witnesses, clearly demonstrate that at least 99 per centum of the services performed by Mr. Walker's establishments were not for resale but rather were "used up" by the consumer. The testimony further shows that there does exist in the employment agency business a category of agency that is wholesale in nature, wherein larger agencies, national in scope, trade or sell job and job applicant information between agencies, and that none of Mr. Walker's establishments did business in this manner. All of this evidence was uncontradicted. The District Court, after hearing the evidence first hand, found the retail or service establishment exemption to be clearly applicable to Mr. Walker's business establishments. On Appeal, the Court of Appeals for the Fifth Circuit reversed and remanded. The Court reported that the case was one of first impression in any Court of Appeals.

In its decision, The Court of Appeals cited a District Court decision that also considered the applicability of the exemption to employment agencies. In Schussler v. Employment Consultants, Inc., 333 F.Supp. 1387 (N.D. Ill. 1971), the trial judge held that the employment agency in question did not involve retail service. However, the reason for this holding, as clearly pointed out by that Court, was that the defendant employer "presented the Court with nothing to indicate that its sales or services are recognized in the industry as retail sale or services". 333 F.Supp. at 1391. This is not so in the case at bar. Much uncontroverted testimony was given by witnesses for the plaintiff as well as the defendant as to the retail aspect of the defendant's businesses.

Another case relied upon plaintiff and cited by the Court of Appeals is Yunker v. Abbye Employment Agency, Inc., 32 N.Y.S. 2d 715 (N.Y.C. Mun. Ct. 1941). This case, tried in the Municipal Court of the City of New York, Borough of Brooklyn, First District, involved an agency that placed job applicants in out of state positions with regularity. It was decided prior to the 1949 Amendment to the Fair Labor Standards Act, at a time when the only kind of sales which could classify as "retail" were those of goods or services consumed in the home. Obviously, an employment agency could not qualify under the law as it existed at that time. Like the Schussler v. Employment Consultants, Inc. case, supra, the Yunker case is clearly inapplicable to the facts of the instant case.

In 1949, Congress abrogated the "business use" test that had been applied theretofore in defining the term "retail" as found in Section 13 (a)(2) of the Fair Labor Standards Act of 1938. An earlier interpretative bulletin issued in 1941 by the Department of Labor's Wage and Hour Administrator had characterized retail establishments as those businesses selling goods or services

to private individuals for personal or family consumption. That bulletin, Interpretative Bulletin No. 6, pp. 9 - 10, issued June 16, 1941, and printed in the 1942 Wage and Hour Manual, pp. 334-335, specifically stated that "employment Agencies are not . . . to be considered service establishments within the meaning of Section 13(a)(2)." To ease the "business use" restriction, Congress amended the law in 1949 to include the present, more liberal definition:

> "a retail service establishment shall mean an establishment 75 per centum of whose annual volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry".

This amendment followed by some eight years the Yunker v. Abbye case, supra, which had relied upon the old "business use" test. Now, after the liberalizing amendment has been adopted, the Administrator weakens his own argument by relying on pre 1949 cases, statutes and interpretations.

The 1949 Amendment changed the law so that sales of goods or services not consumed in the home could now qualify as retail sales. Mitchell v. Kentucky Finance Co., 359 U.S. 290, 294 (1959).

The Mitchell v. Kentucky Finance Company, supra, case dealt exclusively with whether the defendant, who was engaged in making personal loans and in purchasing sales contracts, was entitled to the retail or service establishment exemption. In holding the finance company not exempt, Justice Harlan, writing for the Supreme Court,confined his opinion to enterprises in the

financial industry, a field completely unrelated to Darrell Walker's employment establishments. Justice Harlan also put emphasis on specific legislative exclusion of loan associations and credit companies from the amended section 13(a)(2). (HR Conf. Rep., 95 Cong. Rec. 14932. Report of Majority of Senate Conferees, 95 Cong. Rec. 14877). In regard to Interpretative Bulletin No. 6 of the Wage and Hour Administrator, Justice Harlan noted that "pre-1949 rulings and interpretations by the Administrator should remain in effect unless inconsistent with the statute as amended." (Emphasis added) (359 U.S. 292). In the case of employment agencies which were not eligible for exemption before 1949 because their product, or service, was not consumed in the home, the pre-1949 interpretation would be "inconsistent with the statute as amended."

Another case, Boisseau v. Mitchell, C. C. A. 5th Cir. 1955, 218 F.2d 734, is comparable to the instant case. Appellant Boisseau was operating a letter shop, and although his services were available to all, he was actually rendering service only within his state. In upholding his eligibility as a "retail sales or service establishment" exemption, and reversing, the court utilized the new interpretation of "retail" as found in the 1949 Amendment. The court identified Boisseau's industry by resort to expert testimony and the Government's introduction of the Standard Industrial Classification Manual prepared by the Bureau of the Budget. The Court also found that Boisseau had only one price list for his services, that his services were applicable to all customers. Note that the Fifth Circuit, in Boisseau, recognized government publications as a credible source of reliance in determining the status of a particular business as "retail","service", "wholesale", etc. The Standard Industrial Classification Manual and the

Statistical Abstract of the U.S., 1969, published by the Bureau of the Census, were both accepted into evidence by the trial judge in the instant case. Both listed employment agencies as a Miscellaneous Business Service.

In another case, Hollon v. Dixie Drive-It-Yourself System Montgomery Co., Inc., Dist. Ct. Alabama, 154 F. Supp. 413, the United States District Court for the Middle District of Alabama found that the defendant's vehicle rental business was exempt under 13(a)(2). The defendant in that case sustained the burden of proving it came within the exemption by proving it met the requirements of 13(a)(2) just as Darrell Walker has done in this case. Judge Frank M. Johnson, Jr., in the Dixie Drive-It-Yourself case, said:

> "The cases cited by the parties that were decided before the 1949 amendments to this exemption section and the cases decided since those amendments that ignored the history pertaining thereto are not applicable or controlling."

The Court of Appeals cited Aetna Finance Co. v. Mitchell, 247 F.2d 190 (1st Cir. 1957) in its opinion and relied upon it to justify its summary treatment of the testimony in the instant case. The Aetna case was on appeal to the Court of Appeals for the First Circuit from a finding of the District Court for the plaintiff-administrator. That case involved the affirming of the judgment of the District Court and not a reversal of a judgment rendered by a District Court which had heard evidence first hand. Also, as pointed out in the Aetna case by the Court of Appeals, the sponsors of the 1949 Amendment to the Act had made it explicitly clear that the proposed amendment would not affect the non-exempt status of banks, credit companies, etc. The Aetna

case involved a credit, or loan, company.

There was testimony abundant and uncontroverted in the trial court as to Darrell Walker's establishments having a retail service for sale to individuals. As testified to, this service could not be resold, and Mr. Walker's establishments were representative of the retail side of the employment agency industry - an industry that does have a wholesale aspect. If these employment agency establishments of Mr. Walker's are not entitled to the retail or service establishment exemption of 13(a)(2) of the Fair Labor Standards Act, will any other industry ever again be able to successfully claim the exemption?

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of the foregoing Petition for Certiorari upon Honorable Donald S. Shire, Attorney for Respondent, Office of the Solicitor, U. S. Department of Labor, Room 4141 Main Labor, 14th & Constitution Avenue, N.W., Washington, D. C., 20210, by mailing, postage prepaid, airmail,of the same, this 7th day of July, 1973. I further certify that I have served three (3) copies of the foregoing Petition for Certiorari upon the Solicitor General, Department of Justice, Washington, D. C., 20530, by mailing, postage prepaid, airmail, of the same, this 7th day of July, 1973.

Richard Gill
Counsel for Petitioner

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor, Plaintiff,	)	FILED Feb. 2, 1972 By Jane P. Gordon, Clerk
vs.	)	Civil Action No. 3282-N
GREAT AMERICAN DISCOUNT AND CREDIT COMPANY, INC., a Corporation, ET AL, Defendants.	)	

MEMORANDUM OPINION AND JUDGMENT

This is a proceeding to enforce the provisions of the Fair Labor Standards Act against Defendant employment services.

Plaintiff, as Secretary of Labor, seeks to have this Court enjoin Great American Discount and Credit Company, Inc., and Darrell Walker from violating 29 U.S.C. 206 (a)(1), 206(b), 211(c), 215(a)(2), and 215(a)(5) (Fair Labor Standards Act), as amended, including the restraint of the withholding of such payments of minimum wage and overtime compensation as may be found by the Court to be due under the Act to Defendants' employees. Plaintiff says that the Defendant corporation is engaged, within the jurisdiction of this Court, in the business of operating employment agencies; that Defendant, Darrell Walker, within the

jurisdiction of this Court, is engaged in the business of operating employment agencies under various names and styles, and in addition is, and was at all times material to this case, president of Defendant corporation, in active control and management of the corporation and, as such, was and is an employer within the meaning of the Act.

Plaintiff further says that since March, 1968, Defendants' employees have been and are engaged in the preparation, handling and performing other clerical duties in connection with correspondence, resumes, records and other goods substantial quantities of which have been and are shipped in interstate commerce, and in the taking and placing of out-of-state telephone calls, and that by reason of such activities said employees are and were engaged in commerce within the meaning of the Act.

Plaintiff says that Defendants, through unified operation and common control, engage in a business that qualified as an "enterprise" within the meaning of 29 U.S.C. 203(r); and that said enterprise at all times subsequent to January 31, 1969, has had an annual gross volume of sales made or business done in an amount not less than $250,000.00. Therefore, Plaintiff says that the enterprise is engaged in commerce and its employees are covered under the provisions of the Act within the meaning of 29 U.S.C. 203(s)(1).

Plaintiff further says that Defendants have violated and continue to violate the provisions of 29 U.S.C. 206(a)(1) and 215(a)(2) by paying some of their employees engaged in commerce within the meaning of the Act at rates less than those required by law; and that Defendants have violated and continue to violate 29 U.S.C. 211(c) and 215(a)(5) by failing to make, keep and pre-

serve records accurately and adequately reflecting wages, hours and other conditions and practices of employment.

Plaintiff seeks to have this Court enjoin Defendants from violating 29 U.S.C. 621, et seq (Age Discrimination in Employment Act of 1967). Plaintiff says that Defendants, within the jurisdiction of this Court, since March, 1968, were and are an employment agency within the meaning of the Act.

Plaintiff further says that Defendants have violated and continue to violate the provisions of 29 U.S.C. 623(b) by failing and refusing to refer individuals who are between 40 and 65 years of age for employment because of such individual's age and by classifying and referring individuals for employment on the basis of their ages; and that Defendants have and are violating the provisions of 29 U.S.C. 623(e) by printing and publishing and causing to be printed and published notices and advertisements relating to classifications and referrals for employment indicating discrimination based upon age.

The Plaintiff has dismissed its suit against the Great American Discount and Credit Company, Inc., and will proceed against Darrell Walker alone as the Defendant. By agreement of counsel, monetary matters will be considered in a separate hearing at a later date.

FIRST CAUSE OF ACTION

The Plaintiff's first cause of action is that the Defendant violated the Fair Labor Standards Act, 29 U.S.C., § 201, et seq. Employees of Defendant Walker were engaged in interstate commerce by preparing mail and documents to be sent out of state, participating in interstate telephone calls, writing and communicating adver-

tisements to newspapers distributed interstate. Allen v. Atlantic Realty Co., 384 F.2d 527 (C.C.A. 5), cert.den. 390 U.S. 989; Mabee v. White Plains Publishing Co., Inc., 327 U.S. 511; New England Public Service Co. v. Engel, 145 F.2d 636. The Act, 29 U.S.C., § 203(r), defines "enterprise" as:

> " The related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporated or other organizational units . . .".

There are three elements to be considered: (1) Related activities; (2) Common control or unified operation; and (3) Common business purpose. Wirtz v. Savannah Bank and Trust Co., 362 F.2d 857, 859; Schultz v. Morris, 315 F.Supp. 558, affm'd. 315 F.2d 558. Related Walker businesses constituted an enterprise.

One of the defenses offered by the Defendant Walker seems to be dispositive of the matter. Defendant insists that he falls within an exception provided in Title 29, U.S.C., § 213(a)(2), to the effect that the requirements do not apply to "any employee employed by any retail or service establishment, more than 50 per cent of which establishment's annual dollar volume of sales of goods or services is made within the state in which the establishment is located. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; . . .".

The burden of proving that he lies within

the exception is on the Defendant. Mitchell vs. Kentucky Finance Co., 359 U.S. 290, 3 L.Ed. 2d 815.

In the mind of this Court, under uncontradicted evidence in this case, the above exception clearly applies to the business practices of the Defendant Walker. His employees are employed by employment services of which virtually all[1] of the annual dollar income is made within the states where they are located and the service which they sell, the location of a job for a customer, is not for resale. The undenied evidence was that there is a distinction between wholesale and retail sales or services in the employment service business and that virtually all of Defendant's business is in retail services.

The government seeks to distinguish the business of the Defendant from that defined in the exception on the basis of the rationale of Mitchell v. Kentucky Finance Co., supra. That case involves the question of whether a lending agency falls within the terms of the exception. The Supreme Court in that case points out that, prior to 1949, Section 13(a)(2) exempted from the provisions of the Fair Labor Standards Act:

> "Any employee engaged in any retail or service establishment the greater part of who's selling or servicing is in interstate commerce . . ;".

that the administrator had ruled before 1939 that loan companies and other business entities

1. In the Memphis office, the office most concerned with serving out-of-state customers, only 149 of 2,855 job applicants resided out of state during a representative 18-month period and only 19 of these were placed.

in the financial industry were not within the scope of that exemption[2]; and that, when Congress amended the Act in 1949, it provided that pre-1949 rulings and interpretations by the administrator should remain in effect unless inconsistent with the statute as amended. Mitchell v. Kentucky Finance Co., supra. It further pointed out that the present Section 13(a)(2) (adopted in 1949) differs from its predecessor primarily in the addition of a definition of the term "retail or service establishment," such an establishment being one "75 per cent of whose annual dollar volume of sales of goods or services is not for resale and is recognized as retail sales or services in the particular industry;". Plaintiff insists that, since the Court ruled that the addendum to the section did not bring the loan business into the exemption, it likewise could not bring the employment agency business in the exception since the employment agency business was also ruled by the administrator prior to 1949 not to be within the exception.

Defendant, in this Court's view, demonstrates a valid distinction from the loan business as described in Mitchell, supra. The reason for excluding the loan business from the exception is that the loan business obviously is not a "retail or a service establishment". Nothing in the 1949 amendment changed this, and the interpretative bulletin of the administrator, No. 6, should, therefore, remain in effect as to the loan business. As pointed out in Mitchell, supra,

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2. Interpretive Bulletin No. 6, page 9, paragraph 29.

> "Before 1949, the administrator, in interpreting the term 'retail or service establishment', then nowhere defined in the statute, had, in addition to excluding from the coverage of the exemption personal loan companies and other financial institutions, ruled that a business enterprise generally would not qualify as such an establishment unless 75 per cent of its receipts were derived from the sale of goods or services 'to private persons to satisfy their personal wants', on the theory that sales for business use were 'non-retail'." (Emphasis supplied)

But that

> ". . . Congress was dissatisfied with this construction of the statute, (and) . . . passed the 1949 amendment to Section 13(a)(2) to do away with the rule that sales to other than individual consumers could not qualify as retail in deciding whether a particular business enterprise was a 'retail or service establishment', and to substitute a more flexible test, under which selling transactions would qualify as retail if they (1) did not involve 'resale', and (2) were recognized in the particular industry as retail."

Obviously the reason the employment service was excluded from the exemption by the administrator was that the "sale of services" of employment agencies were not "to private persons to satisfy their personal wants". When Congress did away with the requirement for satisfaction of personal wants, it placed the employment service clearly within the exemption if 75 per centum of its dollar annual volume of sales or services is not for resale and is recognized

as retail sales or services in the particular industry. These facts, including a clear distinction between retail and wholesale employment services[3], were carefully and clearly proved by the Defendant in this case by virtually all of the early government witnesses and were never denied. The reasoning of 29 C.F.R. 779.317 is, therefore, inapplicable in this case. Interpretative Bulletins, while entitled to great weight, are not binding on courts. Skidmore v. Swift & Co., 323 U.S. 134; Foremost Dairies, Inc. v. Wirtz, 381 F.2d 653.

It is, therefore, the opinion of this Court that the Defendant falls squarely within the exemption provided in Section 13(a)(2) of the statute and that the government has failed to prove its First Cause of Action.

SECOND CAUSE OF ACTION

It was virtually conceded by the Defendant that he had violated 29 U.S.C. 623(e), to the effect that it is unlawful for an employment agency to cause to be printed any advertisement relating to any classification for employment indicating any preference based on age. The several advertisements in

3. Defendant proved without contradiction the present distinction between the retail employment agency business where agencies, such as Defendant's, seek to place individual employees directly in contact with employers, and the wholesale employment agency business where wholesale agencies seek to place a large group of potential employees in contact with other agencies which have contacts with potential employers.

the Huntsville newspapers clearly established this violation, 29 C.F.R. 860. Therefore, Defendant should be enjoined from other violations of this statute.

It was, however, not established that the Defendant had been practicing age discrimination, as government witnesses testified unequivocally that it was clearly the practice of the Defendant not to allow age discrimination to be practiced. Therefore, there was no violation of Title 29, U.S.C., § 623(b), to the effect that:

> "It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age."

The Plaintiff failed to carry its burden of proving such a violation; indeed, the preponderance of evidence was against it.

Accordingly, it is the

ORDER, JUDGMENT and DECREE of this Court that the Defendant, Darrell Walker, his agents, servants or employees, be, and they are hereby enjoined and restrained from further violation of the provision of 29 U.S.C., § 623(e), by printing and publishing or causing to be printed or published notices of advertisements relating to classifications or referrals for employment which indicate preferences, limitations, specifications or discrimination based upon age. It is further

ORDER, JUDGMENT and DECREE of this Court that the costs in this cause be, and the same are hereby, taxed against the Defendant, for which let execution issue.

DONE this 2nd day of February, 1972.

/S/ R. E. Varner
United States District Judge

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-2177

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellant,

versus

GREAT AMERICAN DISCOUNT AND CREDIT COMPANY, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Alabama

(April 9, 1973)

Before GEWIN, SIMPSON and RONEY, Circuit Judges.

RONEY, Circuit Judge: The Government appeals from the District Court's determination that defendant's employment agencies are entitled to the "retail or service establishment" exemption in Section 13(a)(2) of the Fair Labor Standards Act. 29 U.S.C.A. § 213(a)(2). We reverse.

BRENNAN v. GREAT AMERICAN, Etc.

Not only is this case one of first impression in this Court, but we are told that no other Court of Appeals has addressed the application of the retail or service establishment exemption to employment agencies.

Our analysis of the problem causes us to conclude that Congress did not intend to exempt employment agencies from the operation of the Act. Defendant Darrell Walker, president of the Great American Discount and Credit Company, Inc., is engaged in the business of operating employment agencies under various names and styles in Alabama and Tennessee. These agencies locate, on a local basis and without the assistance of other agencies, suitable employment for clients, who generally pay the placement fee. The service consists solely of introducing the job applicant and the prospective employer. The agencies are independent establishments and, although Walker communicates frequently with all of them, only rarely do they trade information.

Having agreed to dismiss the action against the Great American Discount and Credit Company, Inc., the Secretary of Labor proceeded against Walker alone. The District Court found that Walker's interests in the various employment agencies constituted sufficiently unified operation and common control to amount to a single enterprise engaged in commerce under the statutory definition:

> "[T]he related activities performed (either through unified operation or common control) by any person or persons for a common busi-

> ness purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units . . . ."

29 U.S.C.A. § 203(r).

The Court concluded, however, that Walker's businesses merited the "retail or service establishment" exemption in Section 13(a)(2), which exempts from the minimum wages and maximum hours requirements of the Act

> "any employee employed by any retail or service establishment . . . if more than 50 per centum of such establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, and such establishment . . . has an annual dollar volume of sales which is less than $250,000 . . . ."

A "retail or service establishment" is defined in that provision as

> "an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry . . . ."

Although the dollar volume of sales of the single enterprise consisting of all of the employment agencies

owned by Walker either as sole proprietor or as a partner exceeded $250,000, none of the individual agencies ever exceeded $250,000 annual gross volume of sales. To obtain the exemption, therefore, Walker need show only that the individual agencies were retail and service establishments within the meaning of the Act.

Walker's claim rests on two arguments: (1) that although an early administrative ruling held that employment agencies were not exempt, a 1949 amendment to Section 13(a)(2) broadened the scope of the exemption to include businesses such as his; and (2) that his businesses meet the statutory requirements because there is industry recognition that its sales are "retail sales or services."

The employer has the burden of proof in establishing facts requisite to an exemption, *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, *reh. denied*, 383 U.S. 963 (1966); *Schultz v. Louisiana Trailer Sales, Inc.*, 428 F.2d 61 (5th Cir.), *cert. denied*, 400 U.S. 902 (1971), and the exemption provisions are to be narrowly construed against those seeking to assert them, *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388 (1960).

From the beginning, the Fair Labor Standards Act of 1938 provided that retail establishments were exempt from the Act. The Department of Labor's Wage and Hour Administrator issued in 1941 an interpretative bulletin which characterized "retail establishments" as those businesses selling goods or services to private individuals for personal or family consumption or to businesses or state agencies if at prices and

in quantities appropriate to personal or family consumption. The Administrator's general characterization of "retail establishhments" was considered by the Supreme Court in 1946. In *Poland Co. v. Walling*, 326 U.S. 657 (1946), the Court held *inter alia* that a business engaged in commercial wiring, electrical contracting for industry, and repair and replacement of electric motors and generators did not constitute a "retail or service establishment." It was suggested that no sale of any article for business or profit-making use, as opposed to personal consumption, could qualify as a retail sale. *See Roland Co., supra,* at 673-677; *see also Martino v. Michigan Window Cleaning Co.*, 327 U.S. 173 (1946); *Boutell v. Walling*, 327 U.S. 463 (1946).

In 1949 Congress abrogated this "business use" test by amending the relevant sections of the Act. But Section 16(c) of the amendment expressly provided that any existing "order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor . . . shall remain in effect . . . except to the extent that . . . [it] may be inconsistent with the provisions of this Act . . . ." 63 Stat. 920 (1949).

The 1941 Interpretative Bulletin had specifically dealt with employment agencies. It is there noted that, although employment agencies perform a service, they "are not in the ordinary case sufficiently similar in character to retail establishments to be considered service establishments within the meaning of Section 13(a)(2)." (Interpretative Bulletin No. 6, pp. 9-10, issued June 16, 1941, and printed in 1942 Wage and Hour Manual, pp. 334-335).

The Government argues that, in Section 16(c), Congress granted its unique imprimatur to the 1941 interpretation which excluded agencies from the exemption. Walker contends, on the other hand, that the 1941 interpretation was premised on the "business use" test, not upon the retail nature of the business, and therefore was inconsistent with the 1949 Amendment. Walker's position, as employer, is that, by eliminating the business use test, the 1949 Amendment broadened the scope of the Section 13(a)(2) exemption to include businesses such as his, which he contends are recognized as providing "retail" sales and services in the employment agency industry.

It was the opinion of the District Court that the exemption clearly applies to defendant's business practices. The Court found that virtually all the income of Walker's employment agencies is derived from transactions completed within the states in which they are located. Their service, which the Court referred to as "the location of a job for a customer," is not for resale. The District Court accepted a distinction between retail and wholesale employment agencies: Walker's, characterized by some witnesses as retail agencies, which seek to introduce individual employees directly to employers, and those characterized as wholesale agencies, which place large groups of potential employees in contact with other agencies representing potential employers. Thus, the Court found that there is a distinction between wholesale and retail sales or services in the employment agency industry and that virtually all of the defendant's business is of a retail character.

The District Court distinguished employment agencies from the loan companies involved in *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290 (1959), on the ground that, since the credit business "obviously" is not a "retail or service establishment" and its status was not affected by the 1949 Amendment, the relevant portions of the interpretative bulletin which excluded loan companies from the retail concept should remain in effect. The District Court decided that the reason the Administrator denied the exemption to employment agencies was that their "sale of services" are not "to private persons to *satisfy their personal wants*." When Congress abandoned the business use requirement, the Court reasoned, employment services were placed within the exemption.

We think the District Court failed to appreciate the threshold "retail concept" test which a business must first meet before the industry characterization of its sales can be considered. The Government correctly argues that it was the failure of employment agencies to meet this test which caused the Administrator to designate them as non-exempt in the 1941 Bulletin and that the elimination of the business use test did not change this fundamental determination.

The so-called expert testimony offered here to characterize the service as "retail" resembled that in loan company cases. In *Aetna Finance Co. v. Mitchell*, 247 F.2d 190 (1st Cir. 1957), the Court found the testimony

to reflect nothing more than the

> disposition (in a more or less rough analogy borrowed from the mercantile field) to refer to small loans to individuals as "retail financing" in contrast to "wholesale" lending institutions which dealt with industry through either buying accounts receivable or financing inventories. Such usage hardly has relevance to the intended meaning of the term "service establishment" as used in Section 13(a)(2).

247 F.2d at 193.

In *Kentucky Finance, supra,* a business making small personal loans and purchasing conditional sales contracts from retailers claimed to be an exempt retail or service establishment. The Company offered evidence that the industry regarded its transactions as retail, but the Supreme Court denied the exemption on the basis of explicit discussion in the legislative history which stated that, industry parlance notwithstanding, the retail concept was not applicable to the credit industry.

In *Idaho Sheet Metal Works, supra,* the Supreme Court flatly rejected the "industry usage" standard for the retail concept, and the Court's conclusive consideration was that reliance on industry parlance "would compel results flatly inconsistent with those Congress explicitly contemplated and might indeed work a major revolution in the Act's coverage not acknowledged in any legislative statement or report before us." 383 U.S. at 201. The Court reasoned that the legislative recital of certain industries, such as telephone, gas, and elec-

tric, "demonstrates that not everything that the consumer purchases can be a retail sale of goods and services" and that industry usage is not controlling. 383 U.S. at 203.

In *Idaho Sheet Metal Works, supra*, the Court clearly indicated a two-step process: (1) ask whether the sale of a particular type of goods or services can ever qualify as retail, whatever the term of the sale; and (2) if — and only if — the answer is affirmative, is it then necessary to determine the terms or circumstances that make a sale of those goods or services a retail sale. 383 U.S. at 202-203.

What we are required first to determine, consequently, is whether the retail concept can ever apply to the employment agency industry.

Determination of whether a business fits the retail concept is not without difficulty. The Administrator concedes that "[t]here are types of establishments in industries where it is not readily apparent whether a retail concept exists and whether or not the exemption can apply." 29 C.F.R. §779.317. In trying to define the characteristics of such an establishment, the regulations acknowledge that a precise line cannot be drawn and exact objective standards cannot be established. 29 C.F.R. §§ 779.312-779.321.

In this situation, courts have consistently relied upon the expertise of the agencies established by Congress to administer its statutes. *See Lewis v. Martin*, 397 U.S.

552 (1970); *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969).

From the inception of the Act, employment agencies have been on the Administrator's non-exempt list. The language of the administrative regulations supports this classification. Throughout the regulations are numerous references to "the traditional local retail or service establishment," 29 C.F.R. § 779.315; "establishments which are traditionally regarded as local retail service establishments such as . . . restaurants, hotels, barber shops, [and] repair shops," 29 C.F.R. § 779.314; and "that a 'retail concept' cannot be artificially created in an industry in which there is no traditional concept of retail selling or servicing." 29 C.F.R. § 779.316. Establishments "not having been traditionally regarded as retail or service establishment cannot under any circumstances qualify as a 'retail or service establishment' within the statutory definition of the Act, since they fail to meet the first requirement of the statutory definition." 29 C.F.R. § 779.316.

A comparison of the Administrator's partial list of establishments lacking a "retail concept," 29 C.F.R. § 317, with the partial list of establishments whose sales or services may be recognized as retail, 29 C.F.R. §320, reflects the propriety of placing employment agencies on the non-exempt list.

A reading of the Administrator's attempts to characterize retail businesses buttresses the decision that the

term "retail" is not properly applicable to employment agencies:

> "The term 'retail' is alien to some businesses or operations. For example, transactions of an insurance company are not ordinarily thought of as retail transactions."

29 C.F.R. § 779.316.

> "Typically a retail or service establishment is one which sells goods or services to the general public. It serves the everyday needs of the community in which it is located. The retail or service establishment performs a function in the business organization of the Nation which is at the very end of the stream of distribution, disposing in small quantities of the products and skills of such organization and does not take part in the manufacturing process. . . . Such an establishment sells to the general public its food and drink. It sells to such public its clothing and its furniture, its automobiles, its radios and refrigerators, its coal and its lumber, and other goods, and performs incidental services on such goods when necessary. It provides the general public its repair services and other services for the comfort and convenience of such public in the course of its daily living. Illustrative of such establishments are: Grocery stores, hardware stores, clothing stores, coal dealers, furniture stores, restau-

> rants, hotels, watch repair establishments, barber shops, valet shops, and other such local establishments."

29 C.F.R. § 779.318(a).

Although courts are not bound by interpretative bulletins, *see* 29 C.F.R. § 779.8, they provide us with guidance simply because they reflect the position of those most experienced with the application of the Act. *See Foremost Dairies, Inc. v. Wirtz*, 381 F.2d 653 (5th Cir. 1967), *cert. denied sub nom. Home Town Foods, Inc. v. Wirtz*, 390 U.S. 946 (1968). The bulletin's persuasiveness depends upon its thoroughness, its consistency, and the validity of its reasoning. *Mitchell v. Trade Winds Co.*, 289 F.2d 278 (5th Cir. 1961). It is evident to us that the Administrator has considered all relevant issues.

Although of no more precedential authority than our own District Court, decisions of the only two other courts which have considered this matter have found employment agencies non-exempt. In *Schussler v. Employment Consultants, Inc.*, 333 F.Supp. 1387 (N.D. Ill. 1971), the Court had "no difficulty in concluding that an employment agency . . . does not involve what is customarily considered a retail service." 333 F.Supp. at 1390. In a case cited by the Administrator in his regulations, the New York City Municipal Court held that employment agencies "are not sufficiently similar in character to retail establishments to be considered 'service establishments' within the meaning of Section 13(a)

(2)." *Yunker v. Abbye Employment Agency, Inc.*, 32 N.Y.S.2d 715, 723 (N.Y.C. Mun.Ct. 1941).

We conclude that the District Court's decision to include employment agencies within the scope of the exemption contravenes the well established principle that exemptions from the Fair Labor Standards Act "are to be narrowly construed," *Kentucky Finance, supra*, at 295, and limited to those "plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc., supra*, at 392; *Shultz v. Instant Handling, Inc.*, 418 F.2d 1019 (5th Cir. 1969); *see Wirtz v. Jernigan*, 405 F.2d 155 (5th Cir. 1968).

REVERSED AND REMANDED.

PERTINENT STATUTORY PROVISIONS

The pertinent provisions of the Fair Labor Standards Act, 29 U.S.C. 201 et seq., are as follows:

SEC. 13(a) The provisions of sections 6 and 7 shall not apply with respect to -

* * *

(2) any employee employed by any retail or service establishment (except an establishment or employee engaged in laundering, cleaning, or reparing clothing or fabrics or an establishment engaged in the operation of a hospital, institution, or school described in section 3(s)(4)), if more than 50 per centum of such establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, and such establishment is not in an enterprise described in section 3(s) or such establishment has an annual dollar volume of sales which is less than $250,000 (exclusive of excise taxes at the retail level which are separately stated). A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; or

* * *

SEC. 17. The district courts, . . . shall have jurisdiction, for cause shown, to restrain violations of section 15, including in the case of violations of section 15(a)(2) the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 6 of the Portal-to-Portal Act of 1947).

* * *

Age Discrimination in Employment Act, 81 Stat. 602, 29 U.S.C. 621, et seq.:

PROHIBITION OF AGE DISCRIMINATION

SEC. 623(b) It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

* * *

SEC. 623(e) It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

RECORDKEEPING, INVESTIGATION, AND ENFORCEMENT

SEC. 626(b) The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217), and subsection (c) of this section. Any act prohibited under section 4 of this Act shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 215). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216, 217): Provided, That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

* * *

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29. "Numerous letters have been received from banks (both commercial and savings); trust companies; building and loan associations; personal loan companies; . . . employment agencies . . . Although we recognize that the foregoing companies perform service, it is nevertheless our opinion that establishments engaged in such businesses are not in the ordinary case sufficiently similar in character to retail establishments to be considered service establishments within the meaning of section 13(a)(2) . . .".